

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 16, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-197
Petitioner	:	A.C. No. 11-00877-04049
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Bulluck

This civil penalty proceeding involves a violation of 30 C.F.R. ' 77.201, a mandatory safety standard for surface coal mines and surface work areas of coal mines requiring that, A[t]he methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum.@

The case was heard by former Commission Administrative Law Judge Arthur Amchan, who concluded that AMAX Coal Company (AAMAX@) did not violate the standard and vacated the citation. 17 FMSHRC 48 (January 1995) (ALJ). The Commission reversed the judge, found a violation, and remanded the case for further proceedings to dispose of the significant and substantial (AS &S@) designation and to assess an appropriate civil penalty. *AMAX Coal Company*, 19 FMSHRC 470 (March 1997). Because Judge Amchan had left the Commission, the remanded case was assigned to me.

THE FACTS

In its decision, the Commission summarized the facts as follows:

On February 2, 1994, MSHA Inspector Arthur Wooten entered the Ahead house@ that was on top of Silo No. 1 at the Wabash Mine. Silo No. 1 is used to store clean coal after preparation prior to shipping. The house, which is approximately 16 by 20 feet, is enclosed and contains electrical equipment, including a 4160 volt conveyor belt, a 220 volt lubrication system, 480 volt heaters, and 120 volt lighting circuits. The conveyor which carries coal into the silo enters the head house through an enclosure before dumping the coal through an opening into the silo. The head house is constructed with tin sheeting placed over a steel framework. The floor of the head house is approximately 6 feet above the roof of

the silo. The roof of the silo has several holes in it for ventilation and access. AMAX tests for methane in the head house on every shift. In the 20 years that the head house had been located on the silo, neither AMAX nor MSHA had ever detected measurable amounts of methane.

As Wooten entered the head house, his methane detector activated, indicating a methane concentration in excess of 1 percent. Wooten took several readings that ranged from .4 to 1.4 percent. The highest readings were found near a light switch and the opening where the conveyor dumps coal into the silo. Both locations are about 3 2 feet off the floor and about 1 foot away from the sides. AMAX's safety director, Charles Burggraf, who accompanied Wooten, opened several doors to dilute the methane, and the methane concentration dropped below 1 percent.

Previously, on January 13, 1994, AMAX had experienced a brief ignition at the base of Silo No. 1, where coal was loaded into railroad cars. On February 1, another MSHA inspector had detected a methane concentration of 3.1 percent at a train loading area, about 200 feet below the head house. The next day C the same day as the citation at issue C the methane concentration at the location was 4 percent.

Wooten issued a citation alleging a violation of ' 77.201. Wooten designated the citation significant and substantial (S & S). In order to abate the violation, he required AMAX to remove two sides of the house to keep concentrations of methane below 1 percent. AMAX accomplished this by shutting down its preparation plant and moving its five employees to the silo where they removed the head house sides. *Id.* at 471 (citations omitted).

On review, the Commission reversed the judge's finding that a violation of the standard had not been established, concluding that the language of ' 77.201 is a clear and unambiguous prohibition against methane accumulations in excess of 1 percent and that the standard's subparts set forth Aimportant steps in addressing the problem that methane presents.@ *Id.* at 474.

PROCEEDINGS ON REMAND

By remand order of April 7, 1997, I directed the parties to determine whether they could agree upon the S & S designation and an appropriate penalty. By letter dated April 18, 1997, the parties informed me that they were unable to reach agreement on the S & S and penalty issues, and referenced their respective positions as set forth in their post hearing briefs.

The Secretary filed her post hearing brief on January 11, 1995, essentially arguing that the violation was S & S because the head house was inadequately ventilated to reduce non permissible methane accumulations, airborne coal dust in combination with methane in the head house was capable of contributing to an explosion, there was electrical equipment in the head

house, and conditions in Silo No. 1 beneath the head house, including a prior methane/coal dust ignition, affected the methane levels in the head house. Secretary's Post Hr'g Br. at 11- 14.

AMAX filed its post hearing and reply briefs on January 10 and 17, 1995, respectively, arguing that the violation was not S & S because the head house was a drafty structure which was accessible to examination, there was no evidence to indicate methane concentrations in the explosive range, miner exposure to the head house was limited, and there was no nexus between the methane conditions at the bottom of Silo No. 1, including the incident of the prior ignition, and the methane conditions in the head house. Accordingly, AMAX concluded that the Secretary had failed to establish that it was reasonably likely that the hazard contributed to would have resulted in an injury. AMAX's Post Hr'g Br. at 19-23.

SIGNIFICANT AND SUBSTANTIAL

Section 104(d)(1) of the Mine Act designates a violation S & S when it is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation is properly designated S & S if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria the Secretary must establish in order to prove that a violation is S & S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2nd 99, 103-104 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, when evaluating the reasonable likelihood of an ignition or explosion, the Commission has examined whether a confluence of factors was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In deciding whether the instant violation is S & S, it is necessary to resolve the dispute between the parties as to the origin of the methane in the head house. Inspector Wooten testified on behalf of the Secretary that he determined the reasonable likelihood of a serious accident happening in the head house based on excessive levels of methane detected in the train loading area of the silo 200 feet directly below, (Tr. 26, 35 and 42), and because a methane and/or coal dust ignition had occurred approximately two weeks before in the train loading area. Tr. 24-26, 28. Furthermore, Inspector Wooten believed that, at the time he issued the citation in question, coal being dumped into the silo forced the methane up out of the silo into the 4 by 4 foot chute of the head house. Tr. 28, 36.

AMAX takes the contrary view that the methane in the head house did not originate in the silo. Samuel Laws, the preparation plant manager, testified that, in his opinion, methane was

expelled from the coal coming into the head house on the conveyor belt, when it was discharged into the chute that dumps coal into the top of the silo. Tr. 103, 107-108. He further testified that it is implausible that methane dispelled in the silo would migrate up with sufficient air pressure to enter the head house through the chute, by overcoming the downward pressure created by the coal being discharged from the conveyor belt through the chute into the top of the silo. Tr. 102-103, 106-107.

I conclude that the Secretary has failed to provide a plausible explanation as to why the methane would seek the path of greater resistance, that is, rising up through the chute against the pressure of the coal being discharged, as opposed to escaping through the ventilation holes in the top of the silo and dissipating into the general atmosphere. To the contrary, I am persuaded by the lack of measurable methane ever detected prior to the incident in question, as well as the evidence that Inspector Wooten's highest readings were taken at two locations of similar height, one being closer to where the opening is where the belt dumps into the silo, (Tr. 60), that the methane in the head house originated from the coal being discharged from the conveyor belt into the chute. Having so found, I decline to apply the methane and/or coal dust conditions in the silo below to the conditions in the head house.

The evidence establishes that the head house was a drafty structure that was partitioned into a side housing the conveyor belt and chute, and the other side housing the bulk of the electrical equipment. Tr. 81, 83, 87. While Inspector Wooten concluded that the methane (irrespective of its origin), in combination with the open-type, non explosion-proof electrical equipment and airborne coal dust, was reasonably likely to have caused an ignition or explosion, (Tr. 58-59), he conceded that he did not take a methane reading in the vicinity of the belt motor, belt starter and automatic lubrication system, nor did he to specify the methane level in close proximity to the heaters or the lights. Tr. 53-54. Therefore, given the considerable separation of the conveyor belt/chute from the electrical equipment, the lack of evidence of non-permissible levels of methane around the electrical equipment, the lack of evidence indicating excessive airborne coal dust, the lesser methane readings higher than 3 2 feet from the head house floor, the confluence of factors necessary to cause an ignition or explosion was not present. This conclusion takes into account the lack of any ignition or explosion in the 20 year history of the head house. Consequently, based on the evidence, I find that there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury from a methane ignition. Accordingly, I find that the violation was not S & S.

CIVIL PENALTY ASSESSMENT

While the Secretary has proposed a civil penalty of \$595.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F. 2nd 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483- 484 (April 1996); *Jim Walter Resources, Inc.*, 19 FMSHRC 498, 500 (March 1997).

Addressing these criteria, the parties have stipulated that (1) the Wabash Mine extracted 3,431,815 tons of coal from January 1, 1993 to December 31, 1993 and AMAX extracted 65,385,647 tons of coal from all its mines during the same period; (2) AMAX had 992 violations at the Wabash Mine in the preceding months ending on October 31, 1993; and (3) the payment of

the proposed penalty would not affect AMAX's ability to continue in business. Tr. 15-16. Accordingly, I find that AMAX is a large operator with a significant history of previous violations.

The remaining criteria involve consideration of the gravity of the violation and the negligence of AMAX in causing it. I find the gravity of the violation to be serious, since the potential hazard to a miner conducting a shift inspection or maintenance of the head house ranges from burn injury to death. However, because methane had never been detected in the head house prior to the instant violation, and because I find, like Judge Amchan, that AMAX had acted prudently in anticipating non permissible methane and had taken immediate and appropriate corrective action when put on notice of the violation, I attribute very low rather than moderate negligence to AMAX. Consequently, having considered AMAX's large size, significant history of prior violations, seriousness of the violation, good faith abatement and small degree of negligence, I find that a civil penalty of \$100.00 is appropriate.

ORDER

Accordingly, Citation No. 3845251 is **MODIFIED** by deletion of the S & S designation and reduction of the degree of negligence from ~~A moderate~~ to ~~low~~, and AMAX is **ORDERED** to pay a civil penalty of \$100.00 within 30 days of the date of this decision.

Jacqueline R. Bulluck
Administrative Law Judge

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